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Mussey v. *Beecher*, 3 Cush. Rep. 511; *Sears* v. *Wingate*, 3 Allen Rep. 103; *Mann* v. *King*, 6 Munf. Rep. 428; *Stainbach* v. *Read & Co.*, 11 Gratt. Rep. 281; *Same* v. *Bank of Va.*, Ibid. 269.

If this doctrine is sound, it has a conclusive application to the present case. But I have not found it necessary to invoke so broad a principle, and as there seems to be difficulty in reconciling the authorities, I have thought it best to decide this case upon its own special circumstances, and to leave the general question open until a case shall arise which renders its decision necessary.

I am of opinion that the decree should be reversed and the bill dismissed.

Superior Court of Chicago.

CONNECTICUT MUTUAL LIFE INSURANCE CO. *v.* WINCHESTER HALL ET AL.

During a war contracts between citizens of the opposing belligerents are completely suspended, and cannot be enforced even by a proceeding *in rem*.

Therefore a mortgagee of land in Illinois could not sue out his mortgage while the mortgagor was a citizen of Louisiana, which was in insurrection; and a decree of foreclosure made under such circumstances was opened by a court of equity, although the statutory period for redemption had passed.

JAMESON, J.—This is a petition for leave to come in, pursuant to the provisions of chapter 21, section 15, of the Revised Statutes, and file an answer to a bill of foreclosure, on which a final decree was entered in 1862.

The facts upon which the petition, as originally filed, was grounded were that the Connecticut Mutual Life Insurance Company, in March 1862, filed a bill to foreclose a mortgage given by the petitioner and his wife in 1859, upon certain lands in Chicago, to secure a bond for $8000, payable in 1864, with interest semi-annually. The bill alleged a failure to pay several instalments of interest due according to the conditions of the bond. This suit was prosecuted to a decree of foreclosure, under which a sale of the mortgaged premises was made September 15th 1862. From this sale no redemption was effected. The petitioner stated that of all the defendants in the suit he was the only one

interested therein, the other defendants being merely nominal parties; that he was never served with process in the suit or notified of its pendency until within a few months before the filing of the petition, and that the only ground of jurisdiction in the court to render the decree against him was the publication of a notice in a newspaper in the city of Chicago. As the statute, under which the petitioner sought to come in and defend, fixed three years as the period within which this might be done, and as much more than the three years had elapsed at the time the petition was filed, he sought to avoid the effect of the statute by setting up facts tending, as he claimed, to excuse him for his delay. He alleged that before, and at the time of filing, the bill of foreclosure, and during its progress to a final decree, the petitioner and his wife were, and that they still continued to be, inhabitants of the state of Louisiana; that during the entire period from July 13th 1861 to June 13th 1865, a state of hostilities which constituted a public war, or such a war as carried with it all the consequences of a public war, existed between the United States, including Connecticut and Illinois, on the one hand, and the organization of states known as the Confederate States, of which Louisiana was one, on the other; that by the laws of war and by the law of nations, as well as by the Act of Congress of the 13th of July 1861, and the proclamation of the President of the 16th of August 1861, issued in pursuance thereof, all commercial intercourse between the inhabitants of the rebel states and those of the loyal states was, during all the period indicated, unlawful, and that all remedies for the recovery of debts were therefore suspended.

To this petition the counsel for the insurance company interposed two objections, one going to the form and the other to the substance of the petition. The first was, that the petition was defective in that it did not affirmatively show that the petitioner was not an inhabitant of some part of the state of Louisiana excepted out of the operation of the President's proclamation of August 16th 1861, prohibiting intercourse as aforesaid. That proclamation declared a state of hostilities to exist, and ordered a suspension of commercial intercourse between the inhabitants of the loyal states and those of the rebel states, except such parts of the latter as maintained a loyal adhesion to the Union, or as were from time to time occupied and controlled by the forces of

the United States. The petitioner, it was said, might have been an inhabitant of some part of the state of Louisiana thus excepted, and so intercourse not in that case being unlawful between him and the citizens of Connecticut and Illinois, he might have interposed his defence within the three years.

This objection was sustained by the court, but leave was given, if the facts would warrant it, to amend the petition so as to obviate the objection.

The second objection was, that in any view of the facts relating to petitioner's residence at the South, the bar of the statute was complete; that the late civil war did not suspend the operation of the statute between the inhabitants of the belligerent sections.

This objection was overruled, the court being of the opinion, upon a full consideration of the authorities, that if the facts were as claimed, the operation of the statute was suspended, and that it created no bar against the petitioner in this case.

An amended petition was thereupon filed, which was supposed to conform to the views of the court, and which averred in general terms that the defendant was, during the period mentioned, an inhabitant of the rebel state of Louisiana, and not of any part of that or any other state excepted by the President from the operation of his said proclamation. As certain parts of the state of Louisiana were, however, amongst the excepted districts, objection was made to this amended petition, that it ought to state precisely and in the affirmative the facts as to the residence or inhabitancy of the defendant, so that the complainant might traverse them and still throw upon the defendant, who could best furnish the proofs, the burden of establishing the issue. This objection was sustained, but leave was again given to amend so as to obviate it. I am now to determine the sufficiency of the petition as thus finally amended to entitle the defendant to come in and answer the bill.

Beside the allegations previously made, the petition contains others to the effect that from the commencement of the war up to March 1st 1862, the petitioner was an inhabitant of the parish of Lafourche, Louisiana, that on that day he entered the Confederate service as an officer, and continued to be an officer until the end of the war; that during all this time he was within the Confederate lines, a belligerent, in the actual service of the Confederate government; that on the 3d of July 1863, he was wounded and

taken a prisoner of war at Vicksburg, and held as such until the 12th of June 1864, when he was exchanged; that while a prisoner of war he was paroled, and by the terms of his parol, was confined to the neighborhood of Thibodeaux in said parish of Lafourche, until the 1st of February 1864, when he was sent to Pascagoula, then within the Confederate lines; that the Federal forces, though not in the actual possession of Thibodeaux when the petitioner arrived there as a prisoner of war, entered that place a few days afterwards, and remained there until he was sent to Pascagoula, as aforesaid. It is also alleged, generally, that from the time of his entering the army on the 1st of March 1862, until the close of the war, the petitioner had no domicil in said parish of Lafourche, and that his family did not reside in said parish from the 1st day of December 1862 until the close of the war.

The material facts, then, are, that from the breaking out of hostilities up to July 3d 1863, when he became a prisoner of war, the petitioner was an inhabitant of a part of the state of Louisiana not excepted from the operation of the President's proclamation of August 16th 1861; and that from the 3d of July 1863 up to February 1864, he was present as a prisoner of war in the parish of Lafourche, in said state, which was then occupied by the Federal forces and was within the Federal lines, after which he was within the rebel lines so long as the war lasted. Precisely when he was in that state, during the period first named, it is true, is not stated, and, so far, the petition is still defective, after so many amendments, but I shall treat it as though what is stated in it negatively were affirmed positively, as I am assured that it is only from inadvertence or from not knowing the importance of accounting for petitioner's inhabitancy during that period, that the allegation failed thus to be made according to the fact.

It is apparent, that in the view of petitioner's counsel, the fact that he bore a military character during the second period indicated, although in the rebel service, makes some difference with his rights in this court.

I shall first assume that he has the same rights as he would have, had he been simply a civilian instead of being a colonel in the rebel army. Under such circumstances, is he entitled to come in and answer, or has he been barred by the statute referred to?

It is clear that he has not been barred, if, first, he was pro-

hibited by the proclamations of the President from all pacific intercourse with the complainant in this case, during the three years following the decree; or if, secondly, by the laws of the United States, had he come to the state of Illinois during the said three years, he could not have effectually appeared to assert his equitable rights in her courts, on account of his previous rebel character.

1. Now there are four proclamations of the President that may be supposed to have a bearing upon the first of these propositions.

The earliest of these was the proclamation of August 16th 1861, issued in pursuance of the Act of Congress of July 13th 1861, interdicting commercial intercourse between the inhabitants of the sections at war with each other, but excepting from the interdict the inhabitants of West Virginia and of such parts of the other Southern States as should from time to time be occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents. In connection with this should be considered the second proclamation modifying it—that of April 2d 1863—the tenor of which was to repeal the exceptions just noticed, on account of the embarrassments created by them in the operations of the government. Now, what was the effect of these proclamations upon the petitioner? Clearly, it was to make it illegal and, therefore, in law impossible for him to hold any pacific intercourse with the complainants from August 16th 1861, up to the time when he became a prisoner of war at Vicksburg, on the 3d of July 1863; because, being a rebel during that period, he was not an inhabitant of a state or part of a state occupied or controlled by the Federal forces, or otherwise within the exceptions in the first proclamation. Again: before the date of his capture by the Federal forces, namely, on the 2d of April 1863, all exceptions made to the operation of that proclamation were repealed, whereby commercial intercourse became absolutely unlawful between the petitioner, being an inhabitant of a rebel state, and the inhabitants of a loyal state, whether he was in a part of a rebel state occupied and controlled by the Federal forces, &c., &c., or not. It follows, that, if the facts are as supposed, these proclamations did not make it legal or possible, but made it illegal and impossible, for the petitioner to appear and defend this case in our courts, at any time during the war. The two remaining proclamations are those known as the Amnesty Pro-

clamations, that of December 8th 1863, and that of March 26th 1864, explaining and qualifying it, containing the scheme of reconstruction devised by President Lincoln. These proclamations promised amnesty and restoration of all rights of property, except as to slavery, or in cases where the interests of third persons would be affected, to all rebels, with certain exceptions, upon their taking the oath prescribed. The excepted classes were, with others, military officers above the rank of colonel, and persons on parole as prisoners of war at the time they should seek to take the oath. Provision was made, however, that persons excluded by these conditions might make special application to the President for clemency, like other criminals. From the 1st day of February, then, when the petitioner ceased to be a prisoner in Federal hands, up to the end of war, it was, apparently, in his power to secure amnesty and restoration of his rights of property, and with them his competence to sue and defend in our courts, by simply quitting the rebel service and taking the amnesty oath; for it is admitted, that his rank in that service at no time was above that of colonel, and even if this were denied, it would still be true, that during the last year and a half of the war, it was in his power to apply for pardon and amnesty; and it was perhaps so far his duty to do so, that if he failed to make the application he could not claim to have been prevented from appearing to defend this cause, so as to avoid the bar of the statute.

2. Admitting, then, that under these proclamations, or some of them, it was lawful, or could have been made lawful, for the petitioner to hold pacific intercourse with the complainant, his creditor, was there any law which would have prevented him from asserting his right to redeem in the courts of Illinois, had he come hither?

I find but one law of Congress that might seem to render nugatory any attempt on his part to enforce here his equity of redemption. It is an act approved July 17th 1862, entitled, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." The fifth section of this act is as follows:—

SEC. 5. *And be it further enacted*, That, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects of the persons hereinafter named in this section, and to apply and use the same

and the proceeds thereof for the support of the army of the United States, that is to say:—

First. Of any person hereafter acting as an officer of the army or navy of the rebels in arms against the government of the United States.

* * * * * * * * * * *

Sixthly. Of any person who, owning property in any loyal state or territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.

It has been held, that this act is binding upon the state, no less than upon the Federal courts: *Norris* v. *Doniphan*, 3 Am. Law Register (New Series) p. 471, per BULLITT, J., decided in the Kentucky Court of Appeals.

But does the act have the effect to prevent a defendant from interposing his defence in a case like the one at bar? It doubtless relates to classes of persons among which the petitioner must be reckoned; persons thereafter acting as officers of the army of the rebels, or who, owning property in a loyal state, should thereafter assist and give aid and comfort to the rebellion. But coming to the important clause, which provides for setting up such a character or conduct as a bar to suits, it is clear that it does not affect the petitioner. It bears only upon cases in which suits should have been brought by rebel officers, or by persons aiding the rebellion, for the possession or use of property belonging to them in loyal states. For our purpose it is sufficient to say, that this suit was not brought by the petitioner, and that, for that reason alone, the statute cannot apply. And if it were contended that, upon the equity of the statute, a complainant ought to be enabled by it to reply to a defence set up by a rebel officer, the answer is, that, by suing such a person, the complainant ought to be held estopped from afterwards setting up that he had no standing in court to defend.

The next question is, does the fact that the petitioner was a rebel colonel, while a prisoner of war within our lines, make any difference as to his rights?

It is contended by his counsel that if the effect of the laws and proclamations cited was to make it his duty to appear and defend within the three years, his military character and relations excused and prevented him from doing so. The only principles

upon which this could be claimed are, first, that his enlistment and military oath subjected him to a *vis major*, which controlled his actions at and before the time when the decree was entered, and continued to do so down to the end of the war, even while a prisoner, and that, consequently, it was impossible for him to appear in the cause; or, secondly, that, while in the rebel service, he was bound by his military honor not to desert therefrom and come North, although while a prisoner of war in Federal hands it might have been physically possible for him to do so.

As to the first principle, I think there is no force in it whatever. Admitting that a *vis major* compelled his continued service whilst he was within the rebel lines, it ceased so soon as he came into our hands as a prisoner of war. His allegiance had always been due to the government of the United States. So long as he was constrained by overpowering force he could not pay that allegiance to his true sovereign, but when that force was removed he could and ought to do so. Certainly, in the courts of his sovereign, it would be impossible to recognise the constraint of the *vis major* any longer than it in fact existed.

In this respect, perhaps, the rule would be different in a foreign war. A prisoner in our hands in such a war would owe allegiance to the foreign sovereign as much when a captive as before, and doubtless while he remained a prisoner would be as incapable of suing or defending upon a contract entered into before the war as though still in the hostile ranks. Duty would not, as in the case of a rebel in a civil war, require him to renounce his connection with the hostile forces, and to aid those of the government opposed to them, whose prisoner he was.

The second principle rests on the supposed controlling effect of the point of honor. Having once entered the ranks of rebellion, whether under constraint or otherwise, military honor required, it is supposed, that the soldier should continue there for ever. As a question of etiquette this may be conceded to be true. But it is not known that that honor, which is said to obtain among certain classes of petty criminals, has ever been recognised by the courts as furnishing a rule of decision, even between themselves, much less between them and those upon whom their depredations have been committed. The same observation must hold true in regard to the more gentlemanly but more heinous criminals, by whom the peace of our country has for years been disturbed. In

saying this, I do not take it upon myself to punish persons engaged in the rebellion—I am simply affirming that the fact of their having been rebels furnishes no ground for enlarging their rights in our courts. The conclusion, then, is, if, by deserting the rebel ranks and betaking himself to the state of Illinois, the petitioner could have effectually appeared and defended this suit, it was his duty to do so, however ungentlemanly from the rebel point of view such conduct might have been.

There is one consideration, however, adverted to but not pressed by counsel on the argument, which in my judgment is decisive of the case in petitioner's favor, whatever may be thought of those already presented.

At the time the bill in this case was filed, a state of war existed between the inhabitants of the rebel states, including the petitioner, and the inhabitants of the loyal states, including the complainant. That this war was a civil war, makes no difference in its bearings upon this cause. It is enough that it was recognised by the Federal authorities, including the highest court in the land, as a war, of which they claimed for the United States and accorded to the rebels, the rights as determined by writers on public law. It has long been a settled maxim, that the existence of the hostile relation suspends all pacific intercourse between the respective belligerents: *Griswold* v. *Waddington*, 16 Johns. R. 438. All contracts entered into, during the existence of a war, are, with a few exceptions relating to the ransom or maintenance of prisoners of war, absolutely void. The reason of this is, first, that by buying from, or selling to, an enemy, I may directly or indirectly enhance his ability to continue the war; and secondly, and chiefly, that the intercourse necessary to the consummation of contracts with an enemy would furnish facilities for traitorous correspondence with little chance of detection: *The Julia*, 8 Cranch 192. This danger is so great, that all intercourse whatever, except that of mutual destruction under the guidance of the public authorities, is interdicted. As a consequence, contracts entered into before the war are absolutely suspended whilst the war continues, not so much because the enemy might have his means of supporting the war increased by allowing them to be enforced, for the benefit might accrue equally to both belligerents, as because the intercourse necessary to enforce them or to fulfil them is inconsistent with the state of war, which is one of mutual

hostility between every man of the one, and every man of the other, belligerent. And though it be certain, in any particular case, that no harm can result from the intercourse, the rule is the same. Thus, a citizen of one country cannot draw bills upon a citizen of another country at war with his own, for the purpose of appropriating funds deposited with him to the use of another enemy, not even for the purpose of withdrawing the funds for his own use: *Hoare* v. *Allen*, 2 Dallas 102; *Griswold* v *Waddington*, 16 Johns. 438, 481–84; *Willison* v. *Patterson*, 7 Taunton 438; *Conn* v. *Penn*, 1 Peters 496. On the same principle, it is unlawful for the owner of property in a foreign country at the time war breaks out between it and that of the owner, to withdraw it, unless it be done immediately after war is declared. Otherwise, if taken by the cruisers of the owner's country, it would be liable to condemnation as prize: *The Rapid*, 1 Gallison 295; same case on appeal, 8 Cranch 155; *The William Bagalay*, 5 Wallace 377. And in one case, where certain British merchants had debts owing to them from French merchants, residing in Guadaloupe, which had been contracted prior to the war, and certain sugars had been received by the agent of the creditors from the debtors, as payment of those debts, and shipped to his principals, it was held, that such a remittance was unlawful, and the ground of the decision was, that the allowing of a commerce with the enemy, under such circumstances, without a license, would be opening the door to treasonable communications: the case of *The William*, cited by KENT, Ch., in *Griswold* v. *Waddington*, 16 Johns. 460. From this it doubtless follows that the slight intercourse necessary to enable a creditor to receive payment of his debt from his debtor enemy would be unlawful. As Chancellor KENT observed in the case just cited, "the idea that any remission of money may be lawfully made to an enemy is repugnant to the very rights of war." And to make it certain that he regarded it equally unlawful to receive money from an enemy as to pay it, he added: "repugnant to the very rights of war, *which require the subjects of one country to seize the effects of the subjects of the other*:" Id. 482. In a state of war, although every man of each nation is an enemy, still it is the war of the nations and not of the individuals, and hence when individuals seize the property of their enemies, as their duty requires, they seize it for national, and not for individual use; they seize it, not

to appropriate it to the payment of debts due them from the owners, but to preserve it for confiscation, that is, for condemnation to the *fisc*, or public treasury.

These positions are clearly deducible from the authorities. If the question were, then, whether, pending the late war, it would have been lawful for a creditor residing here to receive payment of his debt, in money or in goods, from his debtor enemy residing in the Confederacy, the answer would very clearly be, that it would not have been lawful. But admitting this, does it follow, that, during a war, contracts made before the war are so far suspended as to forbid a proceeding to enforce them *in rem*, when the *res* lies at the creditor's hand? I find no direct authority upon the question, but I am satisfied the suspension is complete for all purposes, while the hostile relation subsists.

In the first place, proceedings *in rem* never are, or can be allowed to ripen into a judgment without some sort of notice, either published in the journals or sent to the owner alleged to be indebted, by the person claiming to be his creditor. When a state of war exists, is it not a violation of the creditor's allegiance to attempt to communicate with an enemy, for a private purpose, in either of the modes indicated? What right has he to despatch to his debtor a missive relating to his private business, or to address to him a communication through the public prints? Intercourse of that kind would be liable to all the abuses apprehended from those commercial transactions which are interdicted by law. It is, in my judgment, therefore, within both the reason and the letter of the prohibition against intercourse with a public enemy. If it be said, that when a notice is published in a newspaper, it is unnecessary, and that it is not intended that it should come to the debtor's knowledge; that the principal object of it is to give the court jurisdiction, and that this is given, equally, when the notice has been seen by the debtor in fact and when it has not; the answer is, that the court must presume either that the debtor has seen it or that he has not. If it presumes that he has seen it, knowing his relation, it is bound to note the impropriety of the intercourse by which it was brought to his knowledge, and to refuse to sanction it. If it presumes that he has not seen it, because his relations to the plaintiff are such that it could not reach him, then it should decline to assert a jurisdiction which could only operate as a fraud. For it is not true, that the only

object of a published notice is to give jurisdiction; it is also designed to apprise the debtor that legal proceedings have been commenced, to enable him to appear and make defence, if he choose. Without the latter condition, indeed, the proceedings would be, *jure gentium*, invalid. When, in the suit to foreclose the mortgage in this case, then, the notice was published in a newspaper, directed to the petitioner, informing him that, as he had failed to pay his bond, a bill had been filed to foreclose the mortgage, was it expected by the complainant that the petitioner would receive the notice, or was it believed that he could not receive it, or act upon it if he did receive it? In either event, equally, the publication of the notice was illegal, and might have been punished as an act of unlawful intercourse with a public enemy. Upon such an act no court could found a rightful jurisdiction to proceed to render judgment. If it was believed that the petitioner would or might receive the notice, but that he would be unable to appear to defend the suit, or to protect his interests at the sale, because he sustained the relation of an enemy; or, if it was expected, that he would not, because it was known that he could not receive it, the taking of the decree was a fraud upon him and upon the court. The only principle upon which it could be justified would be, that the debtor being an enemy, had no rights which a court of justice was bound to respect. If the mere publication of a notice in a newspaper could be made the ground of jurisdiction against an enemy's property, under the circumstances supposed, why might it not also against the estate of an infant *in utero*, or against the property of a dead man? Titles thus acquired would rest upon a basis of robbery, not upon a judicial divestiture of the debtor's interest, recognised as just *jure gentium*. Nor could such transfers be sustained as acts of confiscation, since whenever that most odious right of war is exercised, it is done for the benefit, not of individuals, but of the public.

For these reasons I am of the opinion that, if it be true, as alleged in the petition, that in 1862, when the bill in this case was filed, the petitioner was an inhabitant of a country standing in a hostile relation to that of which the complainant was an inhabitant, the contract of mortgage was suspended, and that the proceeding to foreclose it was unauthorized *ab initio*. From this it follows, that had the petitioner sued out a writ of error in

proper time, the decree must have been reversed and the bill dismissed. An order will, therefore, be entered permitting the petitioner further to amend his petition according to the facts as indicated above, within one week, and ten days thereafter to file an answer to the bill, upon payment of all the costs; unless the complainant, in the meantime, shall have taken issue upon the material facts stated in the petition.

United States District Court, District of New Jersey.

IN THE MATTER OF ISAAC ROSENFIELD, A BANKRUPT.

The creation of a debt by fraud is not a ground for refusing a discharge to a bankrupt.

A specification stating that debt had been created by fraud is not a good specification, and will be stricken out on motion.

A bankrupt cannot be examined for the purpose of showing that the debt was created by fraud.

A fraudulent conveyance made, or a fraudulent preference given, before the passage of the Bankrupt Act, are neither of them good grounds upon which to oppose a discharge. Such a conveyance or preference does not come within the terms of section 29 of said act, and a specification alleging such a conveyance or preference will be stricken out on motion.

The difference explained between the meaning of the following phrases in section 29, viz.: "*Since* the passage of this act," and "*subsequently* to the passage of this act."

By the term "fraudulent preference," used in item nine of section 29, is meant only a preference in fraud of the Bankrupt Act, that is, contrary to its provisions.

APPLICATION for discharge of bankrupt.

Abbett & Fuller, for the bankrupt.

McCarter & Goepp, for creditors.

FIELD, J.—There are two questions, the determination of which will dispose of all the exceptions taken to the specifications filed in this case.

1. Is the creation of a debt by fraud, a good ground upon which to oppose the discharge of a bankrupt?

The 33d section of the act provides: "That no debt created by the fraud of the bankrupt, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a